IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1522

ARKANSAS VALLEY G. & T. INC., et al., *Petitioners,*

v.

FEDERAL POWER COMMISSION, et al., *Respondents.*

MOTION OF TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC., FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

Tri-State Generation and Transmission Association, Inc., hereinafter referred to as Tri-State, respectfully moves for leave to file a brief *amicus curiae* in this case. The consent of the attorney for Petitioners has been obtained, and a copy of such consent has been filed with the Clerk of the Court. The consent of the attorney for Respondent Federal Power Commission, while sought, has neither been given nor denied and the consent of the attorneys for the remaining Respondents, also sought, has been denied.

The interest of Tri-State in this case arises from the following:

1. Tri-State is a Colorado corporation which has also qualified to do business in the states of Wyoming and Nebraska. It has twenty-eight members, all of which are either cooperative associations or public utility districts

in the three states. Tri-State is engaged, generally, in the interstate purchase, sale, and transmission of electric energy, as a wholesaler to its members only in the aforesaid three states. It is financed by the Rural Electrification Administration of the Department of Agriculture of the United States. It annually sells more kilowatt hours of energy to its members than any other generation and transmission cooperative (hereinafter called G and T) in the United States.

2. Tri-State has a problem directly related to the instant matter which is simply explained. In 1965, the Board of Directors of Tri-State authorized the construction of certain transmission lines in the states of Nebraska and Colorado, and later adopted a new rate schedule designed in part to pay for such new facilities. Authoriziation for the construction of such facilities was given by the Public Utilities Commission of the State of Colorado and the Nebraska Power Review Board. Both agencies were informed of the proposed rate and made no objection thereto. The Wyoming Public Service Commission, however, took the position that the rate increase could not be permitted in Wyoming because no facilities were planned for that state, and it therefore directed that the prior rate remain in full force and effect. It also directed Tri-State's Wyoming members not to pay the new rate. Thus Tri-State was in the position of having been authorized by two state agencies to construct needed facilities in those states, but having a third state agency interfere with its collection of revenue needed to pay for such facilities. A single regional or national type of regulation, such as that afforded by the Federal Power Commission, is needed to avoid such dilemmas.

The aforesaid actions of the Wyoming Commission prompted the filing by Tri-State of a complaint, seeking an injunction against such interference, in the United States District Court for Wyoming, which Court refused to grant the relief requested. Tri-State has appealed this decision to the Court of Appeals for the Tenth Circuit, which appeal is presently pending before that Court, being No. 9252, *Tri-State Generation and Transmission Association, Inc. v. The Public Service Commission of Wyoming*

et al. All briefs have been filed and oral argument was presented to the Court of Appeals on July 10, 1967. Raised in the Court of Appeals was the question of whether the Wyoming Commission or the Federal Power Commission, or either or both of them, had jurisdiction over the wholesale rates charged by Tri-State to its members. Tri-State answered this question by pointing out that it had, on July 5, 1967, transmitted to the Federal Power Commission, as an initial filing of rates under Sec. 205(c) of the Federal Power Act, copies of its wholesale power agreements with its members, and also certain supporting data including its schedule of rates charged to such members. By letter of July 12, 1967, all of said material was returned to Tri-State by the Federal Power Commission, the Secretary of the Commission pointing out as follows:

> "By opinion No. 511 issued January 5, 1967, *Dairyland Power Cooperative, et al.,* the Commission determined that cooperatively-owned electric suppliers financed in whole or in part by the Rural Electrification Administration do not fall within the scope of this Commission's regulatory jurisdiction as public utilities within the meaning of Section 201 of the Federal Power Act.
>
> "On the basis of the legal conclusions set forth in *Dairyland,* your submittals are not accepted for filing . . . .".

3. The opinion in *Dairyland* was the basis of the Federal Power Commission's opinion in Docket No. E-7306, *Re Salt River Project et al.,* which opinion was affirmed by decision of the Court of Appeals for the District of Columbia Circuit in Case No. 20960, *Salt River Project et al. v. Federal Power Commission et al.,* which decision is the subject of the Petition for Writ of Certiorari by Petitioners in this proceeding.

4. In *Dairyland,* the Federal Power Commission held as follows:

> "Since the generating and transmission cooperatives have become an important segment of the interstate electric industry, at least in certain parts of the country, they should not be exempt from regulation."

The Commission's decision, however, was that while such

cooperatives should not be exempt from regulation, they were nonetheless exempt under the Federal Power Act as it presently exists. In *Salt River Project et al. v. Federal Power Commission et al.*, the Court of Appeals refused to upset the aforesaid opinion of the Federal Power Commission, but it pointed out that if the Federal Power Commission had found in *Dairyland* that generating cooperatives were within its jurisdiction, then the Court would have given judicial deference to such determination.

5. In the instant case in the Court of Appeals, the Petitioners and others advanced several reasons as to why the Federal Power Commission *should* have jurisdiction over rural electric cooperatives and as to why it was felt that the Commission *had* such jurisdiction. Little if any argument was presented, however, based upon the need for rate regulation and the applicability of the sections of the Federal Power Act dealing with such regulation. It is apparent that the position of Petitioners in this Court is not any different, as demonstrated by their Petition for Writ of Certiorari, and accordingly, it is believed that the brief which Tri-State is requesting permission to file will contain the only argument devoted to the rate jurisdiction issue. The need and the desirability of Federal Power Commission jurisdiction over rates of G and T cooperatives, particularly because of the diversity and lack of state jurisdiction over rates in many instances, and the parts of the Federal Power Act relating to rate jurisdiction, are matters on which this Court should be informed.

6. In the instant case in the Court of Appeals, several parties were permitted to intervene, among them being the Minnkota Power Cooperative, Inc.; Dairyland Power Cooperative; and the Committee of Rural Electric Cooperatives, Seven Statewide Associations of Rural Electric Cooperatives, and Eighty-Three Rural Electric Cooperatives. None of these cooperatives or associations thereof represent Tri-State or its views in this proceeding or the views of those rural electric cooperatives which favor Federal Power Commission jurisdiction, and all of these intervenors appeared in opposition to Federal Power Commission jurisdiction. Also permitted to intervene in the Court of Appeals were Holy Cross Electric Association, Inc., and

Empire Electric Association, Inc., and while both of these cooperatives intervened in support of Federal Power Commission jurisdiction, neither of them is engaged in the generation and transmission of electric energy nor could either of them be considered as a G and T. Consequently, it is anticipated that of the parties before this Court in support of Federal Power Commission jurisdiction, there will be only one G and T supporting such jurisdiction, namely, Arkansas Valley G & T, Inc., but it is not expected to present to the Court any argument based upon the rate jurisdiction issue. Consequently, unless Tri-State is permitted to appear as an amicus curiae, it is anticipated that no argument will be presented by any party in support of Federal Power Commission jurisdiction over the rates of interstate G and T's. For these reasons, it is apparent that there will be no adequate representation of the interests of Tri-State by any party to this proceeding.

7. The determination by this Court of the issues involved in this proceeding, if certiorari is granted, will be of great significance not only to the parties before the Court, but also to Tri-State and to every rural electric G and T in the country, and indeed, indirectly to every consumer of electric energy in these United States. The issues involved are truly substantial and of great public importance. This was emphasized in the dissent of Commissioner Bagge in *Dairyland* when he commented as follows:

> "This controversy . . . involves no idle academic exercise. It has real significance to the Nation. Its implications are exceedingly broad."

For these reasons it is respectfully asserted that Tri-State should be granted leave to file a brief as *Amicus Curiae* in the instant proceeding.

Respectfully submitted,

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